THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

April 22, 1975

The Honorable C. C. Nolen
President
North Texas State University
Denton, Texas 76203

Open Records Decision No. 82

Re: Committee report to Board of Regents.

Dear Mr. Nolen:

Pursuant to section 7 of the Open Records Act, article 6252-17a, V. T. C. S., you have requested our decision as to whether information contained in a Report of the Ad Hoc Committee on Athletics to the Board of Regents is excepted from disclosure under section 3(a)(11) as an intra-agency memorandum or under any other exception.

The report is in the form of a memorandum from the Chairman of the Ad Hoc Committee on Athletics to the Chairman of the Board of Regents, and it reports on a Committee meeting held on December 7, 1972. It consists entirely of recommendations of the Ad Hoc Committee made on the basis of this meeting and prior meetings and conferences with various groups and individuals. It contains no purely factual information which could be severed.

The Ad Hoc Committee was made up of four members of the nine-member board of regents.

You contend that the report is an intra-agency memorandum and is excepted from disclosure by section 3(a)(11) of the Open Records Act. This exception is patterned after an almost identical provision in the federal Freedom of Information Act, 5 U. S. C. § 552, and thus the construction given by the federal courts is applicable to ours. Attorney General Opinion H-436 (1974).

The exception in the federal act was designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion concerning administrative action. Most of the cases and commentary deal with written information and exchanges between subordinate and chief. See discussion and authorities cited in Attorney General Opinion H-436 (1974). However, the federal exception has been extended to memoranda written by individual members of an agency. Sterling Drug Inc. v. Federal Trade Commission, 450 F. 2d 698, 707 (D. C. Cir. 1971). The court explained their decision as follows:

> We are primarily motivated by our belief that there is a great need to preserve the free flow of ideas between Commissioners. As we have noted, Congress expressly indicated that intra-agency communications of thoughts and opinions are to be protected, and nowhere is that protection more needed than between the ultimate decision-makers within an agency. In most agencies the exchange of views between Commissioners or Board members is considered perhaps the most essential element in the decisional process. Thus, continual expression of ideas and strong advocacy of positions are to be encouraged to the fullest at this level . . .
>
> With regard to the memoranda issued by the Commission, however, we think the philosophy underlying [the case relied upon] requires a different result. . . . [A]s documents emanating from the Commission as a whole, they are presumably neither argumentative in nature nor slanted to reflect a particular Commissioner's view. . . . These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Sterling Drug Inc. v. F. T. C., supra at 708.

In a later case the same court drew a pertinent distinction concerning intra-agency memoranda. The court said that the case for applying the exemption is:

> . . . markedly weaker where the documents at stake are not solely part of the consultive and deliberative process, but rather reflect actual decisions communicated outside the agency. . . .
>
> Thus, for purposes of applying Exemption 5 we believe a distinction must be drawn between documents composed exclusively for purposes of assisting policy formulation and those which serve to reflect policy already made and announced. Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F. 2d 710, 719 (D. C. Cir. 1973).

While construction of this provision by the federal courts is helpful, the cases must be read in light of our Open Meetings Act, article 6252-17, V. T. C. S., which opens most discussion and deliberation by members of a governmental body to public view, and consequently narrows the protection given to such communications under federal law.

In Attorney General Opinion H-3 (1973), we held that a committee of board members of a governmental body may not meet privately and without complying with the provisions of the Open Meetings Act, for the purpose of formulating recommendations to be made to the full board concerning the disposition of matters before the board. The Open Meetings Act was amended by the 63rd Legislature, Acts 1973, ch. 31, p. 45, following the issuance of Opinion H-3. However, in considering the Open Meetings Act as amended, we held that the amendments did not require a different interpretation, and that the Act still requires meetings of committees of members of governmental bodies at which public business is discussed to be open to the public. Attorney General Opinion H-238 (1974). In this Opinion we said:

> The [Open Meetings] Act simply does not contemplate pro forma public approval by governmental bodies of matters already privately determined by its members sitting in closed committee meetings.

In Open Records Decision No. 68 (1975), we said that the Open Records Act and the Open Meetings Act have similar purposes and should be construed in harmony. We have held that that portion of a meeting at which confidential information is considered is not required by the Open Meetings Act to be open to the public. Attorney General Opinion H-484 (1974). And that portion of the minutes of a meeting which reflects discussion properly held in closed session is not required by the Open Records Act to be disclosed to the public. Open Records Decision No. 60 (1974). For example, written information concerning an individual's employment relationship submitted at a closed meeting is excepted from disclosure under the Open Records Act. Open Records Decision No. 68 (1975).

In regard to the information requested here, what is sought is a report of a committee of the Board of Regents concerning matters considered at its meetings. It reflects group action taken and decisions made by the committee rather than the ideas of an individual member submitted as food for thought. It is our decision that the report is not excepted from disclosure under section 3(a)(11) as an intra-agency memorandum.

However, we believe that it follows from the above discussion that information in the report is excepted from disclosure to the extent that it reflects discussion of matters properly considered at closed meetings.

Section 2(g) of the Open Meetings Act permits meetings to be closed when considering:

> . . . cases involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee. . . .

Portions of the report make recommendations concerning or necessarily involving evaluation of identifiable personnel, and it is our decision that those portions are excepted from disclosure. These include items 1, 2, 7, portions of 8 and all of 10.

Portions of the report concern contemplated negotiations for contracts. If the matters discussed in item 4 are currently in negotiation, we believe that they are excepted from disclosure by virtue of section 2(f) of the Open Meetings Act.

However, this information is only excepted from disclosure to the extent and during the time it may have a detrimental effect on the negotiating position of the University.

It is our decision that certain portions of the requested information are excepted from required disclosure as discussed above. The balance of the report is not excepted and should be disclosed. A copy of the report noting the information which may be deleted prior to disclosure is enclosed.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

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